

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 13, 2012**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2648**

**Cir. Ct. No. 2011CV1483**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**VERONIKA MCCARTHY AND FRANK P. GAURA,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**BRIANE F. PAGEL, JR. AND KREKELER STROTHER, S.C.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Dane County:  
MARYANN SUMI, Judge. *Affirmed.*

Before Lundsten, P.J., Blanchard, J., and Charles P. Dykman,  
Reserve Judge.

¶1 PER CURIAM. Veronika McCarthy and Frank Gaura appeal a judgment that dismissed their contract action against their former attorney, Briane Pagel, and his law firm, Krekeler Strother, S.C. (collectively, Pagel). McCarthy

and Gaura challenge: (1) the circuit court's determination that their complaint failed to state a claim; (2) the failure to appoint an interpreter for McCarthy; and (3) the taxation of costs and fees. We affirm the circuit court on each of these issues for the reasons discussed below.

## BACKGROUND

¶2 On June 11, 2010, Pagel signed a fee agreement with McCarthy and a guaranty with Gaura. Both contracts related to the financial terms of Pagel's representation of McCarthy. Under the fee agreement, McCarthy agreed to pay Pagel at the rate of \$250 per hour for all work done by him, plus actual costs and disbursements incurred on McCarthy's behalf. Under the guaranty, Gaura agreed to be held responsible for McCarthy's financial obligations in the case of her default.

¶3 On November 16, 2010, Pagel notified McCarthy and Gaura that the firm had discovered a conflict of interest and would no longer be able to continue representing McCarthy. The following day, Pagel filed a motion to withdraw as counsel, which the circuit court granted over McCarthy's objections on December 20, 2010. The present lawsuit claims damages resulting from Pagel's failure to file an answer in one of McCarthy's cases and failure to respond to a summary judgment motion in another case while Pagel's withdrawal motion was pending.

¶4 McCarthy filed an ADA accommodation request in this case seeking a Slovak interpreter. Pagel filed a series of motions, including a motion to dismiss the lawsuit. At a hearing on the pending motions, the circuit court first inquired as to whether McCarthy could speak English at all, and whether she was able to understand the court. McCarthy responded that she did speak English and could

understand the court, but had a prior bad experience and sometimes could not follow or express herself as well as she would like. The court noted that McCarthy was “doing pretty well right now,” and decided to hold the request for an interpreter in abeyance unless and until there was an evidentiary hearing. McCarthy indicated agreement by saying “yes.”

¶5 Turning to the motion to dismiss, the circuit court asked Gaura whether the complaint was raising a malpractice claim or a contract claim, and Gaura twice reiterated that it was a breach of contract case based solely upon the fee agreement and guaranty. The court then set a briefing schedule, and ultimately dismissed the lawsuit and taxed costs against McCarthy and Gaura without appointing an interpreter or conducting further in-court proceedings. Additional facts relevant to the issues on appeal will be set forth below as necessary.

#### STANDARD OF REVIEW

¶6 When reviewing a motion to dismiss based on the pleadings or, more specifically, for failure to state a claim,<sup>1</sup> we assume as true any facts set forth in the complaint and consider whether there is any set of facts that the plaintiff could prove in support of the allegations that would entitle the plaintiff to relief. *Peterson v. Volkswagen of America, Inc.*, 2005 WI 61, ¶¶14-16, 281 Wis. 2d 39, 697 N.W.2d 61. Any documents attached to the complaint are considered part of the pleadings and prevail over any inconsistent allegations therein. *Id.*, ¶15.

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<sup>1</sup> The appellants complain that both Pagel and the circuit court used the terms dismissal for failure to state a claim and judgment on the pleadings interchangeably. However, an examination of whether a complaint states a claim is merely the first step in a review of the sufficiency of the pleadings. If the complaint fails to state a claim, there is no need to consider whether the answer or some other pleading joins issue. Therefore, the two concepts are, in fact, interchangeable in the context of this case.

Whether a complaint states a claim upon which relief can be granted presents a question of law subject to de novo review. *Id.*, ¶14.

## DISCUSSION

### *Sufficiency Of The Pleadings*

¶7 The first step in evaluating a breach of contract claim is to determine whether a valid contract exists. *Riegleman v. Krieg*, 2004 WI App 85, ¶20, 271 Wis. 2d 798, 679 N.W.2d 857. Once it has been established that a valid contract exists, the court must determine whether a party has violated the contract's terms and whether any such violations were material such that they resulted in damages. *Id.*

¶8 Here, the parties do not dispute that the complaint was sufficient to establish the existence of two valid contracts. The problem for the appellants is that they have failed to identify in their complaint any specific provision of either contract that Pagel violated. Contrary to the appellants' apparent belief, a breach of contract claim cannot be based upon general duties that may be owed under the attorney-client relationship; it must be based upon the specific language of the contract at issue. Neither the fee agreement nor the guaranty addressed the scope or duration of the representation for which Pagel had been hired, and the fee agreement contained an express clause that Pagel made no warranty or representation concerning the favorable outcome of any legal action. In short, the contracts did nothing more than set out the terms of compensation for Pagel's representation, and there is no allegation in the complaint that Pagel charged McCarthy or Gaura for more hours than he spent working on the cases or at a greater hourly rate than had been agreed to. Therefore, the circuit court correctly

determined that the complaint failed to state a claim for breach of contract upon which relief could be granted.

*Interpreter*

¶9 With regard to McCarthy’s request for an interpreter as an ADA accommodation, we first note that limited English proficiency that is based on a person having a different primary language does not fall within the definition of a disability for purposes of the Americans with Disabilities Act. *See* 29 U.S.C. § 705(9) (2010); 28 C.F.R. § 35.104 (2010). Therefore, any right McCarthy had to an interpreter would be based on WIS. STAT. § 885.38,<sup>2</sup> which applies when a court determines that a person has an inability “to adequately understand or communicate effectively in English in a court proceeding.” WIS. STAT. § 885.38(1)(b)1. and (3)(a).

¶10 Here, the circuit court personally observed that McCarthy appeared able to communicate in English, and McCarthy indicated agreement, at least for purposes of a non-evidentiary hearing. Moreover, McCarthy has not identified anything that she actually misunderstood or was unable to communicate. In short, we do not see anything in the record that would have required the circuit court to appoint an interpreter before ruling on the purely legal issue of the sufficiency of the pleadings.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

*Taxation Of Costs*

¶11 Under WIS. STAT. § 814.03(1), a defendant is entitled to costs whenever the plaintiff is not entitled to them. Under WIS. STAT. § 814.01(1), a plaintiff is entitled to costs “upon a recovery.” Since McCarthy and Gaura did not prevail or make any recovery on their contract claim, they were not entitled to costs and the circuit court properly taxed costs against them.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

